No. 1044

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HERMAN ROSENWASSER, AN INDIVIDUAL DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PERFECT GARMENT COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of California, Central Division

No. 16564, Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERMAN ROSENWASSER, AN INDIVIDUAL DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PERFECT GARMENT COMPANY, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and order of the District Court entered in this cause on April 11, 1944, sustaining a demurrer to the information with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 thereof, and dismissing the said counts. Petition for appeal was filed on April 24, 1944, and is presented to the District Court herewith, to wit, on April 24, 1944.

591071—44

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 401), 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. 201 *et seq.*) in pertinent parts provides:

> SEC. 202. Congressional finding and declaration of policy.
>
> (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) inter-

feres with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of sections 201–219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

SEC. 203. Definitions.

As used in sections 201–219 of this title—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

* * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for

the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 206. Minimum wages; effective date.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under Section 208 of this title,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. * * *

SEC. 207. Maximum hours.

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date (the effective date of section 207 of the act), unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of sections 201–219 of this title.

* * * * *

SEC. 211. Investigations, inspections, and records.

* * * * *

(c) Every employer subject to any provisions of sections 201–219 of this title or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of sections 201–219 of this title or the regulations or orders thereunder.

* * * * *

SEC. 215. Prohibited acts; prima facie evidence.

(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201–219 of this title, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; * * *

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

* * * * * * *

(5) to violate any of the provisions of section 211 (c) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * * * *

SEC. 216. Penalties; civil and criminal liability.

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be sub-

ject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * * * *

THE ISSUE AND THE RULING BELOW

On January 25, 1944, the United States Attorney for the Southern District of California filed a fifteen-count information, in the District Court of the United States for the Southern District of California, Central Division, charging the defendant with violations of the record keeping, minimum wage, overtime, and interstate shipment provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. 201 *et seq.*).[1] The defendant filed a motion for a bill of particulars and demurred to the information on the ground, *inter alia*, that "the said counts of the said information fail to disclose, and it cannot be ascertained therefrom, whether the alleged employees of the defendant were employed and working at a regular rate of pay, subject to the provisions of the

[1] On the trial of a prior identical information against the same defendant (S. D. Cal., No. 16152 Criminal) there had been a verdict of guilty on the six counts submitted to the jury; but the District Judge on January 10, 1944, granted the defendant's motion for a new trial. In the present proceeding the defendant filed a plea of former jeopardy, which was denied, however, on the authority of *Craig* v. *United States*, 81 F. (2d) 816 (C. C. A. 9), certiorari denied, 298 U. S. 690.

Act, or working on a piece-work basis at an irregular rate of pay." The district judge granted in part the motion for a bill of particulars, and postponed consideration of the demurrer until after the filing of the bill of particulars, so that the record might show which of the employees referred to in the respective counts of the information were employed on a piece-rate basis. Thereafter, at an oral hearing on March 27, 1944, he sustained the demurrer with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 of the information, and he subsequently issued a formal order to that effect, dated April 11, 1944, which is based specifically and solely upon the ground that such counts "are insufficient in law to charge an offense under said (Fair Labor Standards) Act in that the provisions thereof do not apply to piece-rate workers." The order dismissed the nine counts as to which the demurrer was sustained and overruled the demurrer with respect to the other six counts. With the aid of the bill of particulars, the District Judge construed the nine counts as applying to piece-rate workers. That construction of the counts is conclusive; and this leaves no other basis for the order sustaining the demurrer as to the nine counts than the express holding of the District Judge, in his order, that the provisions of the Fair Labor Standards Act "do not apply to piece-rate workers." The order is therefore based exclusively upon a construction of the statute; and consequently it is directly appealable to the Su-

preme Court under the Criminal Appeals Act. *United States* v. *Lepowitch*, 318 U. S. 702, 703–704; *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Stevenson*, 215 U. S. 190, 194–195.

THE QUESTION IS SUBSTANTIAL

The Fair Labor Standards Act provides that "every employer shall pay to each of his employees" the prescribed minimum wages. The application of the Act is not conditioned upon the method by which the employee is paid, and there is no exception for employees compensated on a piece-work basis. The statutory definition of "employ" as including "to suffer or permit to work" (Sec 3 (g)) was regarded by the Senatorial sponsor of the statute as "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657). If the definition covers all employment, even in the ordinary sense, it must include piece workers. A decision that the Act was inapplicable to piece workers would provide employers with a simple means of evasion by changing from an hourly, daily, or weekly to a piece-work basis of compensation and would seriously impair the effectuation of its objectives.

For all of these reasons we think it obvious that the Act was intended to apply to piece workers.

The Administrator has so construed it from the beginning,[2] and no court heretofore has ever doubted it. Numerous cases have assumed that piece workers are not exempt, as is apparent from decisions in cases in which piece workers were involved.[3] *Walling* v. *American Needlecrafts, Inc.*, 139 F. (2d) 60 (C. C. A. 6), holds the Act applicable to home workers employed on a piece-rate pay basis; although there was no independent discussion of the method of compensation, the reasoning of the opinion, as well as the decision, is in direct conflict with the opinion below in the instant case.[4] In *Overnight Motor Co.* v. *Missel*, 316

[2] See *Interpretative Bulletin No. 4* (originally issued November 1938), paragraph 8: "Where an employee is employed on a piece-work basis, his regular hourly rate of pay is computed by dividing the total weekly piece-work earnings (including production bonuses, if any) by the number of hours worked in the week. For his overtime work the piece-worker is entitled to be paid a sum, in addition to his weekly piece-work earnings, equivalent to one-half the regular hourly rate of pay multiplied by the number of hours worked in excess of 40 in the week. * * *"

[3] See *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rep. 279 (N. D. Ill.), reversed on another ground, 133 F. (2d) 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Holland* v. *United States Bedding Co.*, 5 Wage Hour Rep. 262 (W. D. Tenn.); *Walling* v. *Youngerman-Reynolds Hardware Co.*, 6 Wage Hour Rep. 1117 (N. D. Ala.); *Walling* v. *Harnischfeger*, 7 Wage Hour Rep. 145 (W. D. Wis.).

[4] The Court in the *American Needlecrafts* case called attention to the provision of Section 6 (a) (5) that in the case of home workers in Puerto Rico and the Virgin Island the wage rate to be paid by the employer should be "not less than the minimum piece rate prescribed by regulation or order," which, the court said, "carries with it an inescapable implica-

U. S. 572, 579–580, fn. 15, the Supreme Court likewise has assumed the Act's applicability to piece-rate workers, by suggesting that the reason for the omission of the word "hourly" from the overtime provision of Section 7 (29 U. S. C. 207), as finally enacted, may have been that it was "not descriptive of piece-work or salary payments."

It is thus apparent that the question presented on this appeal is a substantial one.

Appended hereto is a copy of the Order of the District Court of April 11, 1944; the court rendered no opinion.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

APRIL 1944.

[Endorsed]: Filed May 5, 1944. Edmund L. Smith, Clerk. By Francis C. Baxter, Deputy Clerk.

---

tion that home workers generally are included in the statutory definition of 'employee.'" Since the same provision refers also to piece rates, it carries an equally inescapable implication that piece-rate workers generally are included.

U. S. GOVERNMENT PRINTING OFFICE: 1944